Ground (viii)

I now turn to Ground (viii). This again relates to a finding of fact but I find the grounds of decision of the Board in this respect somewhat puzzling. With regard to this ground, the Board has stated: "The stand taken by the Comptroller is that these sums were expended by the appellant. We accept the appellant's evidence and say that this should not be taken into account. He is the sort of person who will not even part with one cent of his own. We accept his contention that his overseas travelling expenses were paid by his wife-to-be and so on, that is, his mother-in-law paid for the wedding dinner and all the rest."

When the Board reconvened all that appears on the record is that "on 18th August 1971 after hearing further evidence and submissions we dismissed the grounds of appeal 5, etc." Ground 5 before the Board is the present Ground (viii). Not one single reason is given for dismissing this ground of appeal after the Board's wholehearted acceptance of the appellant's evidence as to the sums expended on him by his wife-to-be and his mother-in-law as set out in its grounds of decision at page 55. In view of this acceptance of the appellant's earlier evidence I am unable to understand why the Board reversed itself on a finding of fact some days later. Nor has the Board given any reason for doing so.

Counsel for the Comptroller has tried to explain that the Board did not believe the appellant. That may well be so having regard to the fact that it dismissed the appeal on that ground at a later hearing. But at the hearing on 28th July, 1971 the Board did form a favourable impression of the appellant's veracity. It is therefore not possible for me to say, without knowing more about the reasons for the Board's reversal of its former decision, that the determination at which it finally arrived was the only true and reasonable conclusion it could have reached. It is not as if the Board made a decision firmly one way or the other.

I am unable to understand the Board's decision to dismiss this ground of appeal after accepting what he said earlier. If the Board did in fact announce on 28th July 1971 what it stated in relation to this ground on page 55 of the Record (in his favour) I find it difficult to understand why the Board was "prepared to hear the appellant," as stated on page 42, on 18th August 1971 and why the appellant "wanted to be heard" on this ground as stated in the last paragraph of page 56. This ground accordingly succeeds.

Ground (xii)

With regard to ground (xii) which raises questions of law on which an appeal properly lies, the amounts concerned are trivial and the Board at first left it "to the parties to resolve and if they cannot, then put it in red in the new assets accretion statement." Later, it dismissed this ground without setting out reasons for doing so.

Having regard to the trivial amount involved, I see no merit in this ground. I must say, however, that I agree with the written submissions made on behalf of the Comptroller and the course proposed by the Comptroller therein.

Ground (xiii)

With regard to ground (xiii) relating to costs before the Board, the award of 50% thereof to the Comptroller was, in my view, an exercise of discretion which has not been shown to me to be wrong in principle or unreasonable in all the circumstances.

All the grounds of appeal except ground (viii) are accordingly dismissed.

Order accordingly.

Solicitors: *L. A. J. Smith.*

HELEN HO QUEE NEO v. LIM PUI HENG

[C.A. (Wee Chong Jin C.J., Winslow & Tan Ah Tah JJ.)
July 22, 1974]
[Singapore — Civil Appeal No. 10 of 1974]

Family Law — Divorce — Custody of child — Given to guilty respondent husband — Appeal by wife — Principles of orders for custody discussed — Custody different from care and control — Women's Charter (Cap. 47), s. 113 — Guardianship of Infants Act (Cap. 22), s. 3.

The parties were divorced, the appellant wife having obtained the decree on the ground of the husband's cruelty. The judge made an order for the custody of their only child, a boy, aged 6, to be given to the respondent husband. The judge took into account the fact that the appellant wife was not working and had no income and that the child had been looked after most of the time by the respondent husband's mother. The appellant contended that the respondent had frustrated her wishes to bring up the child herself. The appellant had originally been forced to leave the matrimonial home and the circumstances did not show any intention on her part to abandon the child.

Held: (1) all relevant factors have to be considered including the conduct of the parties and their characters, bearing in mind that the welfare of the child is the first and paramount consideration. No hard and fast rule can be laid down based on the sex of the parent or the child as to who should have its care and control and/or custody;

(2) the expression "custody" does not mean an indivisible whole, it is divisible into constituent elements which could enable the court to give care and control of a child to one parent and to give access and the remaining constituent elements of custody to the other;

(3) having considered all the facts, the proper order to make was to reverse the order for the custody of the child and order that the appellant should have the custody including care and control over the child and responsibility for its upbringing.

Cases referred to:-

(1) *J.* v. *C.* [1970] A.C. 668.
(2) *Jussa* v. *Jussa* [1972] 2 All E.R. 600.
(3) *Re W. (J.C.)* [1963] 3 All E.R. 459.
(4) *Wakeham* v. *Wakeham* [1954] 1 All E.R. 434.
(5) *Re F.* [1969] 2 All E.R. 766.
(6) *Re C(A) (an infant)* [1970] 1 All E.R. 311.
(7) *Tey Leng Yeow* v. *Tan Poh Hing & Anor.* [1973] 2 M.L.J. 53.

COURT OF APPEAL.

J. Grimberg for the appellant.

Francis Khoo for the respondent.

Winslow J. (delivering judgment of the Court): This is an appeal against the decision of a judge who, having, in open court, granted a decree nisi in September 1973 to the appellant/wife on the ground of her husband's cruelty on an uncontested divorce petition,

made an order in February, 1974 in Chambers for the custody of their only child, a boy aged 6, at the time, to be given to the guilty respondent/husband. A prior order for access to the wife during weekends had already been made in May 1973 before the hearing of the petition as the child was then under the respondent's physical control.

Whilst no complaint was made of the correctness of the principles enunciated by the judge in considering whether or not he should make an order for custody in favour of the father, it is the actual application of these principles to the facts of the case which counsel for the appellant contended was wrong — in that the welfare of the child which was the first and paramount though not the only consideration did not merit an order for such custody to be vested in the guilty respondent.

The judge took into account the fact that the appellant was not working and had no income, that the boy had for most of the time been in the respondent's custody and was being looked after by the respondent's mother, that any change in custody would affect the child adversely in so far as its future happiness, sense of security and material welfare were concerned and that the respondent was in a better financial position to bring him up and give him a good education. He accordingly granted custody to the respondent.

It seemed to us however that a dispute existed as to the true reason for the boy's having been for most of the time in the respondent's physical custody albeit through his mother. It was not disputed that the respondent had been guilty of cruelty towards the petitioner, and that, not long after his assault on her for which he was convicted in August 1972, she left him quite understandably to go and live with her mother.

The appellant contended that she had all along been willing to bring up the child herself but that the respondent frustrated her wishes and insisted on its being brought up by his own mother as opposed to hers and also opposed her wishes in the matter of domestic help which she was anxious to engage to enable her to bring up the child.

Having regard to this and other matters in dispute and the reasons given by the judge for making the order which he did, it did not seem to us that an order for custody in favour of the father was justified in all the circumstances as revealed by the record. It was clear from the judge's reasons that he equated "custody" with "care and control" of the child, or at least regarded these expressions as synonymous whereas it seemed to us that "care and control" was only a constituent element of custody.

A line of English authorities from as far back as 1886 has established that split orders can be made so as to give custody to one parent and care and control to the other. Where the parents are unimpeachable in respect of their characters, conduct and capacity to cooperate in caring for the welfare of the child, even orders for joint custody can be made — see *J.* v. *C.*[1] and *Jussa* v. *Jussa.*[2] It should also be noted that sections 3 and 5 of our Guardianship of Infants Act (Cap. 22) follow the lines of corresponding provisions in the United Kingdom — see *Re W. (J.C.)*[3] and *Re F.*[4] which throw further light on the making of split orders after a consideration of such provisions.

Re W. (J.C.), supra, makes it clear that it has become common practice in England to make split orders.

Lord Denning L.J. in *Wakeham* v. *Wakeham*[4] approved of such orders as being realistic.

Section 113 of our Women's Charter, giving the High Court power to make such provision as it thinks fit with respect to the custody, maintenance and education of children in proceedings for divorce, corresponds with statutory powers conferred in almost identical terms by the English Matrimonial Causes Acts and it is pertinent to note that section 112 of our Charter is also in almost identical terms with section 33(1) of the English Matrimonial Causes Act, 1965 in that both refer to satisfactory arrangements being made for the care and *upbringing* of children of a marriage who are under 16 years of age before any decree of divorce is made absolute.

It seemed clear that, at least in the United Kingdom which has similar provisions to ours, "custody" does not have the meaning ascribed to it by Pennycuick J. in *Re W.* The Court of Appeal in that case decided that it did not have the wide meaning of custody as an indivisible whole but that "custody" was divisible into constituent elements which could enable the Court to give care and control of a child to one parent, and to give access and the remaining constituent elements of custody to the other.

It should be noted that section 3 of our Guardianship of Infants Act like section 1 of the corresponding English Act of 1925 empowers a court in any proceedings relating to the custody or upbringing of an infant to have regard to its welfare as the first and paramount consideration. Though section 113 of the Women's Charter refers to custody, maintenance and education of children we could think of no reason why the meaning ascribed to "custody" in the one Act should differ from that given to it in the other.

Megarry J. pointed out in *Re F.*[5] that it was neither desirable nor possible for a "points system" to be devised to determine which of the parents should have the care and control of a child who was already a ward of court. All relevant factors have to be considered including the conduct of the parties and their characters, bearing in mind that the welfare of the child is the first and paramount consideration.

Thus, it is possible for one parent who is otherwise unimpeachable and is in a better financial position to provide the means for promoting its educational and material welfare to be given custody jointly (or separately) with the other whereas the other may be given care and control over it because it may be preferable in the child's interests that it should be placed in the latter's care in view of the greater devotion which the latter may be able to bestow. All the relevant facts and circumstances should be considered bearing in mind the paramount interests of the child even though no hard and fast rule can be laid down based on the sex of the parent or the child as to who should have its care and control and/or custody. In our

view, the correct approach is summed up admirably by Harman L.J. in *Re C(A) (an infant)*[6] as follows: —

"I can see nothing wrong in the consideration of the law which the learned judge applied. He did not, I think, give too much weight to the father's position. He looked, as he should, at the whole background and considered where had the infant better be — and that is really the only question that the court has to ask. I do not at all agree with expressions of opinion which have fallen, perhaps *per incuriam*, from judges that a boy should, as a matter of principle, be with his father — just as much as I disagree with the other 'principle' which has altogether been abandoned, that a girl of under three should, as a matter of principle, be with her mother. Other things being equal, these things may be so, but there is no principle involved in either. They are merely considerations which may weigh with the judge where the scales are nicely balanced."

In our judgment, having considered all the facts, both disputed and otherwise, the proper order to make was to reverse the order for custody made by the judge and order that the appellant should have such custody, including care and control over the child and responsibility for its upbringing. This would ensure that during his tender years he would have the benefit of being brought up by his own mother as opposed to being brought up in a haphazard way by others to whom the respondent might feel disposed to entrust his upbringing. We considered that this change would not affect him adversely as the judge thought but that it would be to his decided advantage in his formative years to be with his mother in all the surrounding circumstances.

Counsel for the respondent asked for joint orders for care and control to be given to both parents and for joint custody. It seemed to us to be absurd, having regard to the obvious bitterness and lack of cooperation prevailing between the divorced parties, to make any such orders. It did not appear to us that the relationship between the parties, culminating in the uncontested divorce proceedings founded on cruelty on the part of the respondent, was such as to make any order for joint custody workable or desirable. It could not be said that the respondent had shown himself to be an impeccable or unimpeachable parent whereas there were circumstances which clearly revealed that, if either parent was unimpeachable or less impeachable than the other, it was the appellant who had originally been forced to leave the matrimonial home and thereby to lose touch with her only child. We did not find that the circumstances as revealed by the affidavits herein showed any intention on her part to abandon him.

We should add that this court approved of the split order made in *Tey Leng Yeow* v. *Tan Poh Hing & Anor.*[7] where an appeal against such an order was dismissed.

We allowed the present appeal with costs and an order was made for the appellant to have custody as well as care and control of the infant, with access to the father as agreed between the parties *i.e.* from 1.30 p.m. on Saturday till 7.30 p.m. on Sunday each week. We also gave liberty to apply generally including the making of any application for maintenance of the child.

Appeal allowed.

Solicitors: *Drew & Napier; T. Q. Lim & Co.*

MALAYSIAN REPORTS

ITAM BINTI SAAD v. CHIK BINTI ABDULLAH

[O.C.J. (Syed Agil Barakbah J.) December 20, 1973]
[Alor Star — Civil Suit No. 171 of 1964]

Land Law — Contract for sale of land — Claim for specific performance — Conflicting equities — Administration of Estates Enactment No. 1 (Kedah), ss. 45 and 31.

This was an action for specific performance of an agreement for sale of land between the plaintiff and the defendant. The plaintiff sued as administratrix of her father's estate, her mother's estate as well as in her own right. The plaintiff had been in possession of the land for many years following possession previously of her late father-in-law and her late husband. The title deed had been in her possession since 1943. The land had been subject to two agreements for sale. The first agreement was made in 1943 between the plaintiff's late husband and the mother of the defendant who was the administratrix of her mother's estate, and the second made in 1948 was a written agreement between the plaintiff and the mother of the defendant. The plaintiff's claim against the defendant as administratrix of her mother's estate was for specific performance of the second agreement in 1948 and her claim against the defendant in her personal capacity was a declaration that the defendant was a trustee of the land for the plaintiff.

The court had to decide whether pursuant to section 45 of the Administration of Estates Enactment No. 1 (Kedah) it could grant permission so that a registrable transfer by sale be made in favour of the plaintiff.

Held: (1) taking into consideration the facts and surrounding circumstances and having regard to the long period of uninterrupted possession by the plaintiff, her possession of the document of title and paying of quit rents, the court ought and should grant permission for the transfer of the grant of title to be registered in the name of the plaintiff;

(2) the plaintiff's delay in bringing action for specific performance could not be held against her as she was in a sense the equitable owner;

(3) the defendant became a trustee of the plaintiff upon the death of the previous trustee, who was the mother of the defendant as the defendant was the administratrix of her mother's estate.

[Editorial Note: The defendant appealed and the Federal Court upheld the decision of Syed Agil Barakbah J. See [1974] 1 M.L.J. 221.]

Cases referred to:-

(1) *Haji Saud* v. *Haji Ahmad & Anor.* [1957] M.L.J. 50.
(2) *Haji Osman bin Abu Bakar* v. *Saiyed Noor bin Saiyed Mohamed* [1952] M.L.J. 37.
(3) *Williams* v. *Greatrex* [1957] 1 W.L.R. 31.
(4) *Peninsular Land Development Sdn. Bhd.* v. *K. Ahmad* [1970] 1 M.L.J. 149 at p. 151.

CIVIL SUIT.

A. Jayadeva for the plaintiff.

A. S. C. Hoe for the defendant.

Syed Agil Barakbah J.: The plaintiff sues the defendant in her capacity as the administratrix of the estate of one Abdullah bin Mohamed (deceased) and also in her personal capacity. The claim involves a piece of land comprised in Surat Putus No. 13380, Portion No. 354 situate in the Mukim of Gelong, District of Kubang Pasu, Kedah, in area of 0 relong 283 jembas 40 square feet (hereinafter referred to as "the said land"). The plaintiff's claim against the first defendant is for specific performance of an agreement in writing between the plaintiff and Mek binti Junus (deceased) dated May 29, 1948, for the sale of the said land by the latter as the administratrix, for damages